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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1255

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA AND DISTRICT No. 2, UNITED MINE WORKERS OF AMERICA,
Petitioners,

v.

SOLAR FUEL COMPANY AND PAUL SCHRECKENGOST,
Respondents.

BRIEF OF RESPONDENT, SOLAR FUEL COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RECORD BELOW

Relevant portions of the District Court's charge to the jury and of colloquies of court and counsel are appended to this Brief (Appendix 1, pp. 1a-13a infra).[1]

Relevant portions of the testimony in the District Court are appended to this Brief (Appendix 2, pp. 15a-18a infra).

[1] The United States District Court for the Western District of Pennsylvania, District Judge William W. Knox presiding, is referred to as "District Court". The United States Court of Appeals for the Third Circuit is referred to as "Third Circuit". The United States Court of Appeals for the Sixth Circuit is referred to as "Sixth Circuit". "R" will hereinafter refer to the Appendix for Appellants filed in the Third Circuit below. "A" will refer to the Appendices in the Petition for Certiorari in opposition to which this Brief is filed. "AA" will refer to the Appendices to this Brief.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Respondent does not accept the statement of Questions Presented as set forth in the Petition (p. 2). In lieu thereof, respondent submits the following:

> Where the contention in the courts below was focused on a factual issue, the Court of Appeals affirmed without opinion and the District Court charged the jury in accordance with applicable decisions of this Court, should certiorari be granted?

COUNTER-STATEMENT OF THE CASE

The National Bituminous Coal Wage Agreement of 1950 as Amended Effective December 1, 1958 (NBCWA) between Petitioner, United Mine Workers of America (UMW) and Bituminous Coal Operators' Association (BCOA) *et al*, contained what was entitled "Protective Wage Clause" (PWC) reading in pertinent part: (Exhibit 208; R. 46a-47a; 1191a-1192a) (AA 15a)

> "PROTECTIVE WAGE CLAUSE
>
> The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that Bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:
>
> A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party

to, not will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract".

Respondent, Solar Fuel Company, was a signatory to NBCWA by virtue of its membership in 1958 in the signatory Somerset County Coal Operators' Association. Later, in 1961-2, it withdrew from membership in that Association (A. p. 10a-11a; R. 97a-102a).

On July 17, 1967 UMW instituted a strike against Solar Fuel Company which continued through 1967 and 1968 (R. 43a).

From the night of July 17, 1967 through the year 1968 the mines of Solar Fuel Company were picketed by the Petitioners who, through their organizers, officers, agents, members and/or employees, attempted to cause Solar Fuel Company to enter into a contract with Petitioners in the same

form as the National Bituminous Coal Wage Agreement of 1950 as amended (R. 43a-44a; 1063a-4a; AA 3a; 15a).

In the course of this strike there was extreme violence even to the extent on some occasions of endangering life. Mine vehicles were burned and run off cliffs. Mine buildings and equipment were burned and otherwise destroyed and damaged. Loads of coal were dumped on a road giving access to one of the mines. The roads were strewn with large nails inserted through bottle caps so as to puncture the tires of any vehicles passing. Explosives were thrown and some people were set upon by mobs of 50 or 100 people and beaten and kicked. An injunction issued by the Court of Common Pleas of Somerset County, Pennsylvania, limiting the number of pickets in an attempt to stop the violence was ignored and at times pickets in the number of 800 or 1,000 assembled on the roads leading to the mines, the groups being so great as to overwhelm the State Police who came to the assistance of the sheriff in attempting to enforce the injunction. The judge issuing the injunction was defied in his courtroom by one of the officers of the international union who told him that the next day the pickets would be out in even greater numbers. These acts were fomented, encouraged, condoned or ratified by officers and representatives of the Unions who did nothing to control the actions of the mobs or to discipline the union members involved although the evidence shows these officials and representatives were present on the picket line. Mr. Jock Yablonski, since murdered, throughout the course of negotiations insisted that Solar Fuel Company had to accede and submit to the terms of the National Bituminous Coal Wage Agreement of 1950 as amended and pay the royalties due per ton of coal and the Union throughout the negotiations insisted that it was without power to negotiate a Contract on any other terms because of the PWC (A. 11a-12a).

The Petitioner Unions attempted to force the National Bituminous Coal Wage Agreement of 1950 as amended upon Solar Fuel Company despite its alleged ruinous effect upon that company and the Union officials, both District and International, refused to negotiate with Solar Fuel Company on any terms other than the National Contract (A. 22a).

Effective October 1, 1968 National Bituminous Coal Wage Agreement of 1968 was entered into between UMW and the Coal Operators (Exhibit 209, R. 1211a; 47a; AA 16a).

In December, 1968 the Unions indicated to Solar Fuel Company's negotiators that at that time there were changes made in the Contract that would permit some latitude in bargaining on some points and that because of the new language in the new Agreement the negotiators of the Unions were allowed to negotiate a contract different from that of the National Contract (R. 625a-627a; 632a-635a; AA 16a-18a).

In January, 1969 Solar Fuel Company filed this action in the District Court claiming damages under Section 4 of the *Clayton Act*, 15 U.S.C. 15 for violation of Section 1 of the *Sherman Act*, 15 U.S.C. 1, and damages for destruction of real estate and personal property as a pendent state cause of action under Pennsylvania Law.

In successive charges to the jury the District Court gave instructions three times almost *ipsissimis verbis* and a fourth time in summary form.

In its first instructions to the jury, the District Court charged:

> The defendants are labor organizations and many years ago Congress decided, as a matter of public policy, that workers are free to engage in association, organization and designation of representatives to negotiate the terms and conditions of employment free from

interference, restraint or coercion of employers and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection and the Courts in the United States are forbidden to issue orders in labor disputes where the Union is proceeding peaceably to accomplish its legitimate ends. Now this brings us to the problem of whether the Unions in this case can be held liable for violating the anti-trust laws (R. 1067a; AA pp. 3a-4a).

We have before us the National Bituminous Coal Wage Agreement of 1950 which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this Agreement has caused some difficulty as to whether the Agreement goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an Agreement in restraint of trade and violation of the Sherman Anti-Trust Act (R. 1067a-1068a; AA p. 4a).

It appears that Solar Fuel Company was originally a signatory to the Amendment of December 1, 1958 which contained the PWC but subsequently withdrew (R. 1068a-1069a; AA p. 4a).

The United States Supreme Court, with reference to this matter, has said that a Union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own Union interests seek to obtain the same terms from other employers. No case under the Anti-Trust laws could be made out on evidence limited to such Union behavior but a Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors in the industry and the Union is liable with the employers, if it is true, even though the Union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. (R. 1069a; AA p. 5a).

If the language of the PWC amounts to an agreement by the United Mine Workers with the major coal operators to impose the conditions of the national contract upon small operators to the latter's damage then the Union can be held liable for violation of the Anti-Trust laws (R. 1069a-1070a; A. 1a).

There is in this case no direct evidence, other than the language of the Contract itself, of using this Agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them but, on the other hand, it does appear that the Union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome terms with other operators, whether signatories or not signatories to the Agreement. Solar Fuel was a party and signatory to this Agreement and then withdrew (R. 1070a; A. 1a-2a).

The Union allegedly called the strike for the purpose of imposing the terms of the National Agreement upon Solar Fuel Company (R. 1070a; A. p. 2a).

There is a sharp conflict in the evidence about the course of these negotiations. Solar's witnesses tell you that the Union negotiators, including Mr. Yablonski, who is now deceased, insisted throughout that Solar sign the National Agreement without any exceptions (R. 1070a; A. 2a).

The evidence on behalf of the Union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the National Agreement. It appears particularly that Solar objected to the payment of 40¢ per ton for the miner's welfare and retirement fund required by the 1964 Amendment to the National Agreement and also objected to the Union shop provisions. The company's testimony is that the Union changed its approach after the 1968 Agreement was signed and indicated in the fall of 1968 that they were willing to negotiate other terms R. 1071a; A. 2a).

If you believe Solar's testimony that the Union throughout, refused to negotiate any of the terms of the National Agreement as a result of having been

disabled by the so-called Protective Wage Clause, part of which I have read to you, and that the Union insisted upon these terms and no others as a result of these provisions of the Contract, then you would be justified in finding that the Union was a party to the Agreement used in restraint of trade in violation of the Anti-Trust laws and you would be justified in finding for the plaintiffs in this Anti-Trust matter. You would also be justified in finding damages for the plaintiffs as parties who were injured by such an agreement and the attempted enforcement of it (R. 1071a; A. 2a-3a).

If, on the other hand, you find that the defendants' evidence is correct, and that the Union did not insist upon these terms and no others, then you should find for the defendants with respect to the Anti-Trust claims in this suit because they have not used this Contract, regardless of what it says, as a Contract in restraint of trade (R. 1072; A. 3a).

After the jury had deliberated for some time it requested the Court to repeat its instructions in regard to violation of the Anti-Trust laws and the District Court then charged as follows:

We have before us the National Bituminous Wage Coal Agreement of 1950 which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this Agreement has caused considerable dispute in the Courts and some difficulty as to whether the Agreement here goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sherman Act Anti-Trust Act (R. 1108a; AA 5a-6a).

A Union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own Union interests, seek to obtain the same terms from other employers. No case under the Anti-Trust Laws could be made on evidence limited to such Union behavior but a Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has

agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it is true even though the Union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry (R. 1109a-1110a; AA. 6a).

If this language amounts to an agreement by the United Mine Workers with the major coal operators to impose conditions of the National Contract upon smaller operators to the latter's damage, then the Union would be liable for violation of the Anti-Trust Laws (R. 1110a; AA. 7a).

There is in this case no direct evidence other than the language of the Contract itself of using this Agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them but, on the other hand, it does appear that the Union by the use of this language on its face has disabled itself from negotiating other and less burdensome terms with other operators not signatories of the Agreement. Solar Fuel Company was originally a signatory of the Agreement and later canceled its membership in the Somerset Coal Operators' Association in an attempt to withdraw from it but it was a signatory to the Agreement as originally set forth (R. 1110a-1111a; A. 5a; AA 7a).

You will recall the testimony that Solar Fuel was a party and signatory to this Agreement and then withdrew and later on the Union allegedly called the strike for the purpose of imposing the terms of the National Agreement upon Solar (R. 1111a; AA 7a).

There is a sharp conflict in the evidence about the course of these negotiations. Plaintiffs' witnesses tell you that the Union negotiators, including Mr. Yablonski, who it appears is now deceased, insisted throughout that Solar signed the National Agreement without any exceptions. The evidence on behalf of the Union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the National

Agreement. It appears particularly that Solar objected to the payment of 40¢ per ton for the miner's welfare and retirement fund required by the 1964 Amendment of the National Agreement and also objected to the Union shop provisions. The company's testimony is that the Union changed its approach after the 1968 Agreement was signed and indicated in the Fall of 1968 that they were willing to negotiate other terms (R. 1111a-1112a; AA 7a-8a).

If you believe Solar's testimony to the effect that the Union refused to negotiate any of the terms of the National Agreement as a result of having been disabled by the so-called Protective Wage Clause, part of which I read to you, and that the Union insisted upon these terms and no others as a result of these provisions of the Contract, then you would be justified in finding the Union was party to the Agreement in restraint of trade in violation of the Anti-Trust laws and you would be justified in finding for the plaintiffs as parties injured by such Agreement. If, on the other hand, you find the defendants' evidence is correct and the Union did not insist on these terms and no others, then you should find for the defendants with respect to the Anti-Trust claims (R. 1112a; A. 5a).

I will not recount here the numerous acts of which the defendants and their agents and their members are accused but it will be sufficient for me to say that you must find that any damages sustained by plaintiffs from these acts of misconduct, if you find the charge is true, must be found to have resulted from and form a part of an illegal attempt to enforce this Agreement and all its terms upon Solar Fuel Company (R. 1113a; A. 8a).

That is the factual question which I am leaving to you to determine, whether the United Mine Workers endeavored to use this Agreement, as written, for the purpose of enforcing an illegal contract, to force these terms on all employers, or whether, even though they were bound by this Agreement, the United Mine Workers nevertheless did not attempt to enforce it on Solar in this case. That is a question you will have to determine (R. 1113a; A. 5a-6a).

After further deliberation the jury again asked for further instructions. Specifically they asked the District Court to further explain the U. S. Supreme Court's decision to which the District Court had twice previously adverted in his charges (R. 1125a; A. 6a-7a; AA 10a).

At that point the District Court further charged the jury as follows:

> I read to you as part of the charge some language from the decision of United States Supreme Court in the case of United Mine Workers against Penington, 381 U.S. Reports, page 657 in which the Court said: A Union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own Union interests, seek to obtain the same terms from other employers. No case under the Anti-Trust laws could be made out on evidence limited to such Union behavior but we think the Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers, if it is true, even though the Union's part in the scheme is an undertaking to obtain the same wages, hours or other conditions of employment from the remaining employers in the industry (R. 1126a; AA 10a).
>
> I further told you that there was no direct evidence in this case of any actual agreement between the UMW and the coal operators to accomplish this purpose. We have no evidence in this case of that but we do have evidence that the Union insisted that they had to have this contract, with no other words added to it, it had to be this contract or nothing, these terms or nothing, and that they were doing that as a result of that clause which you have seen in the Agreement and if you find that is true, that they were using this contract for that purpose, then you could find that they were participating in a restraint of trade under the Sherman Anti-Trust Act because they have disabled themselves from

negotiating any other terms with Solar who was a signatory at the time the original clause was entered into. Now, if on the other hand, they did not do that but, in this particular case, decided to vary from the terms of the National Contract, as has been testified Mr. Yablonski said, and it was said several times, if that evidence is true then the United Mine Workers are not using this contract as an instrument to impose the terms on a small company like Solar so as to help out the large competitors which is what the Supreme Court is obviously worried about (R. 1126a-1127a; AA 10a-11a).

We all know that a Union has a right to bargain and to use its best efforts to secure better wages and working conditions for its members that is what it is for and it is protected in this right under the law and as long as it is doing that on its own we have no criticism of it but yet, on the other hand, if part of the Agreement with the coal operators is to force higher wages and difficult working conditions on the smaller operators which they can't meet and the Union is engaged in that and was doing that in this very situation with Solar Fuel, using this contract for that purpose then you are permitted to find a violation of the Anti-Trust laws (R. 1127a-1128a: AA 11a).

The United States Supreme Court will not permit a Union to agree with a group of employers that they are going to use the wages set forth in the National Contract for the purpose of driving small competitors out of business. Beyond that I don't think I can do anything to help you. It is a factual question in this case whether the Union did do anything like that and you have testimony which is diametrically opposed and you have to resolve that conflict. That is what jurors are for (R. 1128a-1129a; AA 12a).

The jury then resumed its deliberations but in a very few minutes returned and the following final colloquy took place in open court between the jury and the District Court:

The foreman of the jury addressed the Court stating that the jury had sat there three times listening to the charge but were confused as to whether or not they could use the Protective Wage Clause (R. 1130a; AA 12a).

The District Court replied that the jury should consider the Protective Wage Clause in the light of the actions, the demands made by the Union, if those demands were made, if they said they couldn't veer from this Agreement (R. 1130a-1131a; AA 12a).

Juror No. 4 then asked the Court if it was not correct that the Protective Wage Clause was not illegal by itself unless there was corroborating evidence that they used it for imposing the National Agreement on Solar Fuel Company (R. 1131a; AA 13a).

To this question the District Court answered that if they used it in this case against Solar Fuel, if they said in the beginning, we will negotiate on any terms you want then they have not used that Agreement as an instrument to violate the Anti-Trust laws and you cannot find such violation but if they did use it in this case then you would be justified in making such a finding (R. 1131a; AA 13a).

The jury returned its verdict in favor of Solar Fuel Company for violation of the Anti-Trust laws (R. 1132a-1133a; A. 3a).

The jury found no damages for the other plaintiff, Schreckengost, for violation of the Anti-Trust laws. It also brought in verdicts for both plaintiffs on the pendent jurisdiction claims under the Pennsylvania State law (R. 1132a-1133a).

After judgments entered, the District Court entered an Order denying Petitioners' post-trial motions and filed an Opinion in support of that Order (R. 1147a-1166a; A. 10a-26a).

In this Opinion the District Court held:

1. The PWC was in effect in the years 1967-1968 until expressly rescinded by the NBCWA of 1968 effective October 1, 1968. The Union claims that this clause was wiped out and rescinded by the amendments of 1964. There is no evidence that the PWC contained in the 1958 amendment was terminated by the 1964 amendment and we have concluded that as a matter of fact it was not terminated until the 1968 agreement effective October 1, 1968 (R. 1153a-1156a; A. 16a-18a).

2. Nowhere was this issue of rescission of the PWC in 1964 raised in the pleadings, in the pre-trial narratives, at the pre-trial conference or during the trial itself (R. 1157a-1158a; A. 20a). To permit this new theory to be injected at the close of the case would completely undermine the integrity and effectiveness of the pre-trial procedures and pre-trial order in this case (R. 1159a; A. 21a).

3. The great weight of the evidence indicated that the defendants had attempted to force this contract upon Solar despite its alleged ruinous effect upon plaintiff and that the Union officials, both District and International, had refused to negotiate with plaintiff on any terms other than the national contract (R. 1161a; A. 22a).

4. The jury was told that labor unions generally were exempt from the Anti-Trust laws and were free to pursue their legitimate ends in securing better wages and working conditions for their members without being held liable under the Anti-Trust laws and that the crucial point in this case was whether under these circumstances the agreements were in violation of these laws and whether the Protective Wage Clause as sought to be enforced by the Unions in this case had become and was used as an agreement in restraint of trade in violation of the Sherman Act the purpose of which had been explained to the jury (R. 1163a; A. 24a).

On appeal the Third Circuit ordered and adjudged that the judgment of the District Court was affirmed without opinion (A. 27a).

ARGUMENT

There is no substantial Federal question presented.

A.

Until this point in the case the focus of contention has been on the fact question whether PWC was in effect in 1967-1968.

At all times in this case prior to this Petition for Certiorari the arguments of the parties have been focused on the question of fact whether PWC was in effect in 1967 and 1968 at the time of the events involved. No contention on this point was advanced by the Unions before or at the trial of this case but this issue has been the cynosure beginning with the Union's post-trial motions in the District Court and continuing in the Third Circuit.

That is true by Petitioner's own admissions.

The oral argument in this case before the Third Circuit was described as follows by Petitioners at page 3 of their Petition for Rehearing *En Banc* filed in that Court:

> "Oral argument in this case was focused on a single question: whether the PWC remained in effect in 1967 and 1968 or whether it was dropped from the NBCWA in 1964."

In another case Petitioner, United Mine Workers of America, has referred to "the issue in Solar[2] of whether PWC was repealed by the 1964 amendment to the National Agreement" and stated that the District Court's "reasons for rejection of the issue of PWC's prior rescission was that its injection 'came too late' since it was not raised in

[2] This case in the District Court and in the Third Circuit.

pleadings, in pre-trial narrative statements, at pre-trial conference or during the trial".[3]

Certiorari is not granted "to review evidence and discuss specific facts": *U. S. vs. Johnston*, 268 U.S. 200, 227.

B.

The District Court correctly charged the jury as to the liability of the Unions, for violation of the Anti-Trust laws.

The District Court held that its charge to the jury as to the liability of the Union for violation of the Anti-Trust laws was in conformity with the requirements of *UMW vs. Pennington*, 381 U.S. 657 and *Ramsey vs. UMW*, 401 U.S. 302 (A. 23a-25a).

In this conclusion the District Court was correct.

Three times it charged the jury as to the rule of *UMW vs. Pennington:* (R. 1067a-1069a; AA 3a, 5a; R. 1069a-1072a; A. 1a-3a) (R. 1108a-1110a; AA 5a-7a; R. 1110a-1111a; A. 5a; R. 1111a-1112a; AA 7a-8a; R. 1112a; A. 5a; R. 1113a; AA 8a; R. 1113a; A. 5a-6a) (R. 1125a-1129a; AA 10a-12a).

Further, the District Court repeated the same matter in summary form in reply to questions of the foreman of the jury and juror No. 4 (R. 1130a-1131a; AA 12a-13a).

The instructions as thus given were in strict accord with the requirements of the cases.

In *Pennington it was held* (381 U.S. 664-669):

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may

[3] George Ramsey, et al. vs. United Mine Workers of America, No. 73-503 in the Supreme Court of the United States, October Term, 1973, Brief of Respondent, United Mine Workers of America in Opposition to Petition for Writ of Certiorari, p. 39. Certiorari denied December 3, 1973, 42 U.S. L.W. 3326.

> in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.
>
> • • •
>
> Thus *the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws*".

In *Ramsey* we find the same thing in different words (401 U.S., 313):

> "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct."

The District Court strove mightily to make the law as thus stated clear to the jury and read to that jury the language of *Pennington* by chapter and verse (R. 1126a; AA 10a).

In *South East Coal Company v. United Mine Workers of America*, 434 Fed. 2d 767 (1970) (Certiorari denied, 402 U.S. 983) the Sixth Circuit summarized *Ramsey* and *Pennington*, as applied to the Protective Wage Clause, as follows (p. 782):

> "Reviewing the Ramsey decision's interpretation of Pennington, four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if, however, the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws".

We submit that the charge of the District Court was also correct according to the interpretation thus placed upon PWC by the Sixth Circuit.

In addition, we believe that the District Court's charge was also proper because the correct construction of PWC is that it is itself an illegal bargain for which the Union is not exempt under the Anti-Trust laws.

By 1958 when PWC was first agreed to by the Union and the BCOA, *et al.*, the Union had executed the National Contract with many different bargaining units in addition to those represented by BCOA. The National Bituminous Coal Wage Agreement of 1950, with is many signatories (R. 1167a) had been followed by the National Bituminous Coal Wage Agreement of 1950 as amended January 18, 1951 (R. 1167a), the National Bituminous Coal Wage

Agreement of 1950 as amended September 29, 1952 (R. 1179a), the National Bituminous Coal Wage Agreement of 1950 as amended effective September 1, 1955 (R. 1183a), and the National Bituminous Coal Wage Agreement of 1950 as amended effective October 1, 1956 (R. 1187a). Each of these successive amendments had its numerous signatories (R. 1175a-1176a; 1178a; 1182a; 1186a and 1190a). Somerset County Coal Operators' Association of which Solar Fuel Company was a member had signed all of these prior forms of the National Bituminous Coal Wage Agreement of 1950 (Same R. references as in previous sentence).

When the PWC was signed in December, 1958 and when Solar Fuel Company became a signatory thereto through Somerset County Coal Operators' Association, the effect of PWC was to bind the Union to the same contract with many and different bargaining units. Even if PWC bound the Union only to insist upon identical contract terms as against "signatories" the Union was no longer free to agree to different terms with any previous signatory to the National Bituminous Coal Wage Agreement and Solar Fuel Company was such a previous signatory.

C.

The asserted conflict between the Third and Sixth Circuits does not exist.

UMW asserts that there is a conflict between the decision of the Third Circuit in this *Solar* case and that of the Sixth Circuit in *Ramsey* (481 F. 2d 742, cert. denied 42 U.S. L.W. 3326 (1973)).

By UMW's own admission in its Brief in opposition to the granting of certiorari in Ramsey no such conflict exists. At page 39 of that Brief UMW stated:[4]

[4] See footnote 3, at page 16, supra.

"There Is No Conflict Between The Sixth Circuit Majority's Holding And The Third Circuit's Solar Fuel Case

Petitioner's claim of a conflict between the Sixth Circuit majority's holding and that of the Third Circuit in Solar Fuel Co. v. UMW, 478 F. 2d 1401 (July 6, 1973) has no merit.

An initial observation is that factually, as to PWC, Solar is wholly disparate from the instant Ramsey case: the issue in Solar of whether PWC was repealed by the 1964 amendment to the National Agreement is not an issue in the instant Ramsey case; the district court's Solar opinion is wholly devoid of uncontradicted testimony found in Ramsey relating to PWC's background (ante, pp. 9-12); and its reasons for rejection of the issue of PWC's prior rescission was that its injection 'came too late' since it was not raised in pleadings, in pre-trial narrative statements, at pre-trial conference or during the trial."

CONCLUSION

For the reasons herein discussed Solar Fuel Company, respondent, respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. METZ, JR.,
HENRY G. BEAMER, III,
Counsel for Respondent,
Solar Fuel Company.

(In Chambers)

MR. LIVINGSTON: Your Honor, do you treat, in your charge, the discussion of the P.W.C.?

THE COURT: Yes.

MR. LIVINGSTON: Okay. (R. 1052a)

(In Chambers)

MR. LIVINGSTON: John, wait a minute. I have a problem here. My problems are always creating doubt in my mind. It just seems to me, in this particular case, that it should not be left to a jury but should be a question of law and directed as such as to whether or not the union is bound by the provisions of the P.W.C. in dealing with Solar Fuel Company. Now, the reason for the inquiry is that I disagree vigorously with Mr. Metz' interpretation of the P.W.C. as it applies to Solar Fuel. I have no quarrel or problem with Mr. Metz indicating his feelings to the jury, but it is my judgment that, as a matter of law, the restrictions imposed on the negotiations by the P.W.C. do not apply to the Solar Fuel Company by the very language of the—of that section of the P.W.C. set forth in the first paragraph in Mr. Justice White's opinion in Ramsey against the United Mine Workers, and that is the language that provides, "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce, without discrimination or favor, the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its

continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." I have two problems with that in light of Mr. Metz' interpretation of it. If Solar Fuel was a signatory in the 1958 contract, if, indeed, they were a signatory, and I doubt that they were, but the period of the contract was that period from '58 to '59, and, during that period, there might have been a restriction on the dealing—

THE COURT: No, it was extended by the amendments.

MR. LIVINGSTON: But they were not a party to the contract as extended by the amendments. They were finished with this in any degree by simply resigning from an organization that was a signatory to it.

MR. METZ: Well, of course, they were still a signatory at that time.

MR. LIVINGSTON: In '58.

THE COURT: That's right.

MR. LIVINGSTON: But I am saying this, Your Honor, that, during the period of this contract, there were restrictions put upon the United Mine Workers, and the period of that contract was not 1967-68.

THE COURT: No. I am ruling this applied to Solar Fuel as a signatory. However, I am leaving to the jury whether the United Mine Workers did, as a matter of fact, try to enforce this. That is a matter of fact for the jury because of the sharp contradiction between what Mr. Berkey said and Mr. Lease and others said.

MR. LIVINGSTON: And, also, there is a question of whether or not the contract was an agreement, in fact, in restraint of trade or an attempt by the mine workers to represent their membership.

THE COURT: I am saying it is not a restraint of trade unless it was attempted to be enforced.

MR. LIVINGSTON: And even if attempted to be enforced, it is not, in effect, a restraint of trade.

THE COURT: Well, that may be, but I am ruling that it is.

MR. LIVINGSTON: Okay. I just wanted a ruling, Your Honor.

THE COURT: Very well, that is your ruling. (R. 1053a-1055a)

(Instructions to Jury)

It has also been stipulated that the officers of District No. 2 are appointed by the International Union, the United Mine Workers of America, and that the union, on July 17, 1967, instituted the strike against the plaintiff, Solar, and that they attempted to cause the plaintiff, Solar Fuel Company, to enter into a contract with the defendants in the same form as the National Bituminous Coal Wage Agreement of 1950, as Amended, and that the defendants were also attempting to make Solar's employees join plaintiff unions —defendant unions. This agreement, which is important to this case, will be given to you. It is Exhibit No. 208. (R. 1063a-1064a)

(Instructions to Jury)

We must say to you, however, that the defendants in this case are labor organizations, and, many years ago, Congress decided, as a matter of public policy, that workers are free to engage in association, organization and designation of representatives to negotiate the terms and conditions of employment free from interference, restraint or coercion of employers and to engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection, and the courts in the United States are forbidden to issue orders in labor disputes where the union

is proceeding peacefully to accomplish its legitimate ends. Now, this brings us to the problem as to whether the unions in this case can be held liable for violating the antitrust laws.

Now, we have before us this Exhibit 208, the National Bituminous Coal Wage Agreement of 1950, which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this agreement, as amended, has caused considerable dispute in the courts and has even caused the Supreme Court of the United States some difficulty as to whether the agreement goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sherman Antitrust Act. The language in question is contained on page two of the amendment of December 1, 1958, which reads as follows: "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all parties signatory thereto."

It appears that Solar Fuel Company, at the time, was a member of the—one of the coal associations which operated —which signed this contract. It was originally a signatory thereto, although they later withdrew.

Now, the United States Supreme Court, with reference to this matter, has said that "A union may make wage agreements with a multi-employer bargaining unit"—that is the coal operators—"and may, in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior, but we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. Thus, the relevant labor and antitrust policies compel us to conclude that the alleged agreement between the U.M.W. and large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." (R. 1067a-1069a)

(Instructions to Jury)

We have before us Exhibit 208, the National Bituminous Wage and Coal Agreement of 1950, which was in effect at the time of the events we are concerned with in 1967 and '68. Certain language contained in this agreement, as amended, has caused considerable dispute in the courts and has even caused the Supreme Court of the United States some difficulty as to whether the agreement here goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sher-

man Antitrust Act. The language in question is contained on page two of the amendment of December 1, 1958, which reads as follows: I am quoting from paragraph A at the top of page two of that amendment. I think it is marked for you. I think you will read it, but I will repeat it again.

"During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce, without discrimination or favor, the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." The United States Supreme Court, with respect to this contract has held—and I am quoting from the United States Supreme Court decision—"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of it own union interests, seek to obtain the same terms from other employers. No case under the antitrust laws could be made on evidence limited to such union behavior, but we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. Thus, the relevant

labor and antitrust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws."

I emphasize the words "if proved."

Now, in other words, if this language amounts to an agreement by the United Mine Workers with the major coal operators to impose the conditions of the national contract upon smaller operators to the latter's damage, then the union would be liable for violation of the antitrust laws. (R. 1108a-1110a)

(Instructions to Jury)

Now, as to that, I told you later that it appeared that Solar Fuel Company was, originally, a signatory of the agreement and had later cancelled its membership in the Somerset Coal Operators Association in an attempt to withdraw from it, but it was a signatory to the agreement as originally set forth.

You will recall the testimony that Solar Fuel, a family organization, was a party and signatory to this agreement and then withdrew and, later on, an election was held, and, after deciding contested ballots, the NLRB determined to certify the United Mine Workers as the bargaining agent for Solar employees, but Solar, nevertheless, refused to bargain, for reasons which were discussed by Mr. Berkey, and the union allegedly called the strike for the purpose of imposing the terms of the national agreement upon plaintiff, Solar.

You will recall that there is a sharp conflict in the evidence about the course of these negotiations. Plaintiffs' witnesses tell you that the union negotiators, including Mr. Yablonski,

who it appears is now deceased, insisted throughout that Solar sign the national agreement without any exceptions. The evidence on behalf of the union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the national agreement. It appears, particularly, that the plaintiff, Solar, objected to the payment of 40 cents per ton for the miners' welfare and retirement fund, required on page two of the 1964 amendment to the national agreement, and also objected to the union shop provisions. You will recall the company's testimony is that the union changed its approach after the 1968 agreement was signed, which was before execution of that amendment, Exhibit 209, and indicated, in the fall of 1968, that they were willing to negotiate other terms (R. 1111a-1112a).

(Instructions to Jury)

I will not recount, here, the numerous acts of which the defendants and their agents and their members are accused, but it will be sufficient for me to say that you must find that any damages sustained by plaintiffs from these acts of misconduct, if you find the charge is true, must be found to have resulted from and form a part of an illegal attempt to enforce this agreement and all its terms upon plaintiff, Solar Fuel Company (R. 1113a).

(In Chambers)

MR. METZ: But what they are asking for is about the Supreme Court decision.

THE COURT: I will see if there is anything further in here that would enlighten them any more about that. There is one other paragraph; I think it is only going to confuse them further.

"On the other hand, the policy of the antitrust laws is clearly set against the employer-union agreements seeking

to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The Anti-competitive potential of such a combination is obvious, but it is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt, it would hardly be possible to deny exemption to such avowedly discriminatory schemes."

MR. METZ: That would suit me fine if you would read that to the jury.

THE COURT: I think that will serve to confuse matters. I think I will read this to them again, if this was only to better their wages and working conditions of their members, it is all right. If, on the other hand, they are doing this as part of a combination with employers to serve the ulterior purposes—the word "predatory" is used in here—of the employers, they are not protected, and, if they find that the union in this case did actually use this contract—

MR. METZ: Or try to use it.

THE COURT: Or try to use it for this purpose, then they could find a violation of the antitrust laws. On the other hand, if they find the union did not use this contract for this purpose in this case, they cannot find liability (R. 1120a-1121a).

(The following proceedings took place in open court.)

THE COURT: Members of the jury, you have submitted a further question: "We would like to have the Court further explain to us the U.S. Supreme Court decision in regard to paragraph A of the Protective Wage Clause as Amended, effective December 1, 1958, of the National Bituminous Coal Wage Agreement of 1950."

I read to you, as part of the charge, members of the jury, some language from the decision of the United States Supreme Court in the case of United Mine Workers against Pennington, 381 U.S. Reports, page 657, in which the Court said, "A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union interest, seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior, but we think the union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. Thus, the relevant labor and antitrust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure the uniform labor standards throughout the industry, if proved"—you will recall I emphasized those two words, if proved—"was not exempt from the antitrust laws."

Now, I further told you there was no direct evidence in this case of any actual agreement between the U.M.W. and the coal operators to accomplish this purpose. We have no

evidence in this case of that, but we do have evidence that the union insisted that they had to have this contract, with no other words added to it, it had to be this contract or nothing, these terms or nothing, and that they were doing that as a result of that clause which you have seen in the agreement, and, if they—and if you find that is true, that they were using this contract for that purpose, then you could find that they were participating in a restraint of trade under the Sherman Antitrust Act because they have disabled themselves from negotiating any other terms with Solar, who was a signatory at the time the original clause was entered into. Now, if, on the other hand, they did not do that but, in this particular case, decided to vary from the terms of the national contract, as has been testified Mr. Yablonski said, and it was said several times, if that evidence is true, then the United Mine Workers are not using this contract as an instrument to impose the terms on a small company like Solar so as to help out the large competitors, which is what the Supreme Court is obviously worried about.

We all know that a union has a right to bargain and to use its best efforts to secure better wages and working conditions for its members. That is what it is for, and it is protected in this right under the law and, as long as it is doing that on its own, we have no criticism of it, but, yet, on the other hand, if part of the agreement with the coal operators is to force higher wages and difficult working conditions on the smaller operators, which they can't meet, and the union is engaged in that and was doing that in this very situation with Solar Fuel, using this contract for that, purpose, then you are permitted to find a violation of the antitrust laws.

I don't know whether I have clarified it or not, but I think that is the best I can do. It wouldn't help any to read this whole Supreme Court decision, which covers many pages and, of course, as usual, has various judges who have various reasons and dissents and so forth. I have given you the sum total of it. I think that is the best I can do.

I have said in my charge that this matter has caused great difficulty to the Court; it has caused difficulty, as you can see, to the United States Supreme Court on how to handle it, but the United States Supreme Court will not permit a union to agree with a group of employers that they are going to use the wages set forth in the national contract for the purpose of driving small competitors out of business. Beyond that, I don't think I can do anything to help you. It is a factual question in this case whether the union did do anything like that, and you have testimony which is diametrically opposed, and you have to resolve that conflict. That is what jurors are for (R. 1125a-1129a).

(In Open Court)

THE FOREMAN: We have sat here three times listening to your charge again, and we are confused as to that paragraph of the charge, as to whether we are able to use that in this particular case, as to the Supreme Court's decision on it. We don't—we are not sure whether we can use it, if it pertains to a conspiracy or does it pertain to an antitrust law? Can we use that paragraph? This is the thing.

THE COURT: Yes. You should consider it.

THE FOREMAN: We can consider that paragraph?

THE COURT: Yes. In the light of the actions, the demands made by the union, if those demands were made, if they said they couldn't veer from this agreement.

JUROR No. 4: It is not illegal, by itself, unless there is corroborating evidence they used it for that?

THE COURT: If they used it in this case against Solar Fuel. If they said, in the beginning, we will negotiate on any terms you want, then they have not used that agreement as an instrument to violate the antitrust law, and you cannot find such violation. If they did use it in this case, then you would be justified in making such a finding (R. 1130a-1131a).